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SUPREME COURT, U.S.

NO. 98-494

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

ERIEVIEW CARTAGE, INC.
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
BOARD OF FINANCE AND REVENUE,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

D. MICHAEL FISHER
Attorney General

BY: J. BART DeLONE
Deputy Attorney General
Counsel of Record

CALVIN R. KOONS
Senior Deputy Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Appellate Litigation Section

Office of Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-3226

QUESTION PRESENTED

I. Whether a state taxing statute violates the Commerce Clause where it complies with every factor outlined by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

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STATEMENT OF THE CASE

Petitioner, Erieview Cartage, Inc., asks the Court to grant certiorari to review an order of the Pennsylvania Supreme Court that affirmed without opinion an opinion of an intermediate appellate court which rejected petitioner's challenge to the assessment of its corporate net income and franchise taxes. Petitioner is a commonly controlled contract motor freight carrier. During the tax years on appeal, (1986 through 1988) Petitioner provided transportation services by hauling property into, through, and from Pennsylvania. Petitioner served numerous customers with locations throughout Pennsylvania; Pennsylvania mileage represented 17.6% of Petitioner's total mileage in 1986, 15.4% in 1987, and 12.9% in 1988. Petitioner operated within Pennsylvania, and everywhere else, through the use of drivers and equipment leased from independent contractors. Respondent's Appendix pp. 18a-20a.[1]

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[1]The parties to this action entered into a stipulation of facts, which was not included in Petitioner's Appendix. Respondent has attached that stipulation of facts as part of an appendix to this brief. Reference to that appendix will be cited by "Respondent's Appendix p. ____."

Due to its regular substantial presence, and continuous conduct of business within Pennsylvania, Petitioner was assessed a corporate net income tax as well as a franchise tax (hereinafter collectively the "Taxes") by the Pennsylvania Department of Revenue. Petitioner filed a Petition of Review with Respondent, The Commonwealth of Pennsylvania Board of Finance and Revenue. That petition was denied and Petitioner appealed to the Commonwealth Court. The Commonwealth Court, in its opinion [2], reviewed each of the factors outlined by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and determined that the Taxes comply with the Commerce Clause. The Commonwealth Court held that Petitioner's activities have a substantial nexus with Pennsylvania, that the Taxes: are fairly apportioned[3]; do not

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[2]Rule 14.1(I)(i) and (ii) of the Rules of the Supreme Court of the United States requires that Petitioner's Appendix include all opinions entered in conjunction with the judgment sought to be reviewed. The Commonwealth Court's unreported opinion and that court's earlier decision concerning these parties, *Erieview Cartage, Inc. v. Comm. of Pa.*, ___ Pa. Cmwlth. Ct. ___, 654 A.2d 276 (1995), incorporated by reference in that opinion, are not included in Petitioner's Appendix and are included in Respondent's Appendix at pp. 1a-15a.

[3]The corporate net income tax and franchise tax are both apportioned using the same revenue miles fraction. (*See* 72 P.S. §7401(3)(2)(b)(1).) The numerator of that fraction is the revenue miles within Pennsylvania and the denominator is the total revenue miles. This fraction is applied to a taxpayers apportionable income and its franchise tax value to determine what portion of that

discriminate against interstate commerce[4], and are fairly related to the services provided by Pennsylvania.[5] Respondent's Appendix, 11a-13a. Petitioner appealed to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court affirmed the Commonwealth Court without opinion.

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income in value is attributable to Pennsylvania. Since the use of this apportionment formula by all jurisdictions would not result in more than 100% of a taxpayer's income being taxed and accurately reflects how trucking income is earned by apportioning to miles traveled within each state, it satisfies this Court's two-pronged test to determine what constitutes fair apportionment. *See Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169-170 (1983).

[4]All carriers conducting activities within Pennsylvania are subject to the Taxes without regard to whether business is conducted wholly within Pennsylvania or in a number of states. Interstate carriers are not treated any differently than intrastate carriers.

[5]In addition to Petitioner's use of Pennsylvania's roadways, bridges, and the benefits of its roadway maintenance and safety services, Petitioner also availed itself of Pennsylvania's economic market and enjoyed the benefits and protection of its courts, laws, and law enforcement allowing Petitioner to pursue its income generating activities in Pennsylvania.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT OR CONFUSION CONCERNING WHAT FACTORS DETERMINE WHEN A STATE TAXING STATUTE COMPLIES WITH THE COMMERCE CLAUSE.

Petitioner attempts to characterize this case as one in which the Court's guidance is necessary to resolve a conflict among state courts concerning the proper factors to determine when a state tax on interstate carriers violates the Commerce Clause and to explain the "economic underpinnings" of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the decision which defines those factors. In fact, Petitioner has cited outdated caselaw that is no longer valid and misstated modern decisions to create the illusion of conflict where there is none. There is no evidence that the state courts have refused to follow *Complete Auto* or they have had difficulty in interpreting it. The Commonwealth Court did so, correctly we believe, and so did the cases cited by Petitioner which postdate *Complete Auto*. The test *Complete Auto* announces is fact specific, therefore the result of that test varies from case-to-case. These variations present no reason for the Court to grant certiorari.

Whether or not a state tax complies with the Commerce Clause[6] is determined by the application of a number of factors outlined by this Court in *Complete Auto Transit, Inc. v. Brady*, *supra*. In that case, the Court held that what must be considered is not the formal language of a tax statute but rather its practical effect; that such a statute will be sustained against a commerce clause challenge where it:

> [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the state.

Id. at 279.[7]

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[6]Petitioner, in its petition, also suggests that the Taxes violate the Due Process Clause. However, Petitioner does not present any factual basis or legal authority to support this assertion. This Court has specifically held that where a commercial enterprise purposefully avails itself of the benefits of a state's economic market, the Due Process Clause does not bar enforcement of that state's tax against the commercial enterprise even if it has no physical presence in the state. *Quill Corporation v. North Dakota*, 504 U.S. 298, 306-308 (1992).

[7]Petitioner, in its petition, perfunctorily mentions three of the four factors outlined in *Complete Auto*. (Petitioner's independent contractors travel more than one and a half million miles on the highways of Pennsylvania on its behalf each year; representing 12% to 18% of Petitioner's business activities. The Court has held that the fact that Petitioner's leased motor transportation equipment is operated by independent contractors is not constitutionally significant; that a taxpayers nexus with a state cannot be defeated by the fact that the activity of the taxpayer is performed by independent contractors instead of agents or employees. *See Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 250 (1987). Accordingly, Petitioner does

Prior to *Complete Auto Transit, Inc. v. Brady, supra*, this Court held that a tax on the privilege of doing business if applied to what is exclusively interstate commerce violated the Commerce Clause. *Spector Motor Services, Inc. v. O'Connor*, 340 U.S. 602, 610 (1951). *Complete Auto Transit* overruled *Spector Motor Services* and held that interstate commerce could be taxed. *Complete Auto Transit, Inc. v. Brady, supra* at 288-289. Despite this Petitioner cites a number of cases that predate *Complete Auto*, specifically rely on *Spector Motor Services per se* rule against taxing interstate commerce, and are no longer valid law.

The modern cases which Petitioner asserts conflict with the Commonwealth Court's decision are *Commonwealth of Virginia, Department of Taxation v. B.J. McAdams*, 227 Va. 548, 317 S.E.2d 788 (1984), (a Virginia Supreme Court case) and *Erieview Cartage, Inc. v. Department of Revenue of Illinois*, No. 1-93-2565, (Ill. App.

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not mention its substantial nexus with Pennsylvania.) Petitioner appears to suggest that the Taxes do not meet these three factors. Petitioner, in its petition, misstates the extent of the services provided to it by Pennsylvania and incorrectly suggests that the Taxes apply differently to interstate commerce but cites absolutely no legal authority to challenge the conclusion reached by the Commonwealth Court that the Taxes meet all of the factors outlined in *Complete Auto*.

Ct., April 24, 1996) (an Illinois appellate court decision).[8] Review of these cases establish that all three courts used the factors outlined in *Complete Auto* to determine that the Commerce Clause had not been violated.

Petitioner asserts that the Illinois courts' conclusions conflicted with the Commonwealth Court's decisions and reached a contrary result concerning the constitutionality of the specific state taxes. *Petitioner's Brief at pp. 8, 15.* This assertion is simply wrong. The Illinois court's decision reached the same conclusion as the Commonwealth Court in this action; finding, after review of *Complete Auto*, that the Illinois state tax satisfied the requirements of both the Commerce and Due Process Clauses. *Appendix at p. A4.*[9]

Similarly, Petitioner's suggestion that the Virginia Supreme court's decision in *McAdams* conflicts with the Commonwealth

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[8]This decision was not reported. The petition for leave to appeal to the Illinois Supreme Court was denied. 168 Ill. 2d 587, 671 N.2d 729, 219 Ill.Dec. 562 (1996).

[9]The Illinois court did grant partial tax relief finding that pass through miles were not taxable under the language of the specific Illinois income tax statue in question. The Commonwealth Court in its decision made clear that in this action, unlike the Illinois tax, "the Commonwealth's CNI and franchise taxes clearly apply to all of the taxpayers activities conducted within the Commonwealth." Respondents' Appendix at pp. 3a and 4a.

Court's decision here because it failed to consider one of the factors in *Complete Auto* (whether the tax was fairly related to the services provided by Virginia), *Petitioner's Brief at p.9*, is also incorrect. In *McAdams*, the Virginia Supreme Court held:

> the present Virginia income tax laws as applied to interstate commerce are not only constitutional but are also *fair and reasonable recompense for services and benefits provided* to interstate carriers by the taxpayers of Virginia. The burden of proving that the statutory scheme of taxation fails to make the prerequisite requirements of *Complete Auto*, *supra*, rest upon the taxpayer. See *Moorman Mfg. Co. v. Bair*, [437 U.S. 267, 275] (1978). *McAdams* has carried no such burden here.

Commonwealth of Virginia, Department of Taxation v. McAdams, *supra*, 317 S.E.2d at 792 (emphasis added).

The Virginia Supreme Court, the Illinois appellate court, and the Commonwealth Court, considered the factors referenced in *Complete Auto* and held that the taxing statutes in question did not violate the Commerce Clause. Petitioner may disagree with how these factors were actually applied in each instance. However, application of these factors is fact specific, dependent upon the varying language of the individual state statutes involved and,

therefore, differs from case to case. These differences do not constitute a conflict between state courts of last resort concerning what the proper rule of law is. All of these courts used the proper rule and reached the same conclusions. Petitioner's attempts to create the impression of conflict and confusion does not change that fact.

CONCLUSION

For these reasons, respondent respectfully requests that the Court deny the writ of certiorari.

Respectfully submitted,

D. MICHAEL FISHER
Attorney General

J. BART DeLONE*
Deputy Attorney General

CALVIN R. KOONS
Senior Deputy Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Appellate Litigation Section

Office of Attorney General
Appellate Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-3226

DATED: October 26, 1998

***Counsel of Record for Respondent**

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ERIEVIEW CARTAGE, INC., Petitioner	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, Respondent	:	: No. 437 F.R. 1992
ERIEVIEW CARTAGE, INC., Petitioner	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, Respondent	:	: No. 438 F.R. 1992
ERIEVIEW CARTAGE, INC., Petitioner	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, Respondent	:	: No. 439 F.R. 1992
ERIEVIEW CARTAGE, INC., Petitioner	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, Respondent	:	: No. 440 F.R. 1992

ERIEVIEW CARTAGE, INC.,	:	
Petitioner	:	
	:	
v.	:	
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
Respondent	:	No. 441 F.R. 1992
ERIEVIEW CARTAGE, INC.,	:	
Petitioner	:	
	:	
v.	:	
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA,	:	No. 442 F.R. 1992
Respondent	:	Submitted: May 9, 1997

BEFORE: HONORABLE JAMES GARDNER COLINS,
President Judge
HONORABLE JIM FLAHERTY, Judge
HONORABLE EMIL E. NARICK, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY PRESIDENT JUDGE COLINS FILED: June 10, 1997

Erieview Cartage, Inc. (Erieview) petitions for review of an order of the Board of Finance and Revenue (Board) sustaining the Department of Revenue's (Revenue) assessment of corporate net

income[10] (CNI) and corporate franchise[11] taxes for the years 1986 through 1988.

The stipulated facts of the case and the issues raised by the parties are identical to those we confronted in our 1995 en banc decision, Erieview Cartage, Inc. v. Commonwealth, 654 A.2d 276 (Pa. Cmwlth.), appeal quashed, 542 Pa. 677, 668 A.2d 1138 (1995) (Erieview I), involving the tax years 1983 through 1985. In that opinion we concluded that the Taxpayer was subject to the CNI and franchise taxes based on the total number of miles it logs in the Commonwealth, both pass-through miles and miles travelled in connection with a pick up or delivery in the Commonwealth.

In support of its argument that insufficient nexus exists between the Taxpayer and the Commonwealth to support taxation, the Taxpayer cites an unpublished decision in which an Illinois court found that Erieview was not subject to Illinois income tax with respect to pass-through miles. Erieview Cartage, Inc. v. Department

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[10]Sections 401-412 of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, as amended, 72 P.S. §§7401-7412.

[11]Sections 601-606 of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, as amended, 72 P.S. §§7601-7606.

of Revenue of the State of Illinois, No. 1-93-2565 (Ill. App. Ct., April 24, 1996). (Petitioner's Brief at Appendix B.) We note that the Illinois court's decision reached the same conclusions as this Court in finding that the Taxpayer's activities constituted sufficient nexus with the taxing state to satisfy commerce clause and due process considerations. The Illinois court found that pass-through miles were not taxable under the language of the Illinois income tax statute in question. Id. (Slip op. at pp. 5-6.) In the instant matter, the Commonwealth's CNI and franchise taxes clearly apply to all of the Taxpayer's activities conducted within the Commonwealth.

For the reasons set forth in Erieview I, judgment is entered in favor of the Commonwealth.

/s/
JAMES GARDNER COLINS, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ERIEVIEW CARTAGE, INC.,	:	
Petitioner	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
Respondent	:	No. 437 F.R. 1992
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v.	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
Respondent	:	No. 438 F.R. 1992
ERIEVIEW CARTAGE, INC.,	:	
Petitioner	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
Respondent	:	No. 439 F.R. 1992
ERIEVIEW CARTAGE, INC.,	:	
Petitioner	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
Respondent	:	No. 440 F.R. 1992

ERIEVIEW CARTAGE, INC., Petitioner	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, Respondent	:	No. 441 F.R. 1992
ERIEVIEW CARTAGE, INC., Petitioner	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, Respondent	:	No. 442 F.R. 1992

ORDER

AND NOW, this 10th day of June, 1997, judgment in the above-captioned matter is entered in favor of the Commonwealth in the amount of $40,233:

	Franchise Tax	Corporate Net Income Tax
1986	$ 4,691	$ 9,121
	285 penalty	988 penalty
1987	$ 4,193	8,330
	260 penalty	940 penalty
1988	$ 3,719	7,149
	236 penalty	321 penalty

Judgment becomes final unless exceptions are filed within thirty (30) days of the entry of this order pursuant to Pa. R.A.P. 1571(i).

/s/
JAMES GARDNER COLINS, President Judge

ERIEVIEW CARTAGE, INC., Petitioner,

v.

COMMONWEALTH of Pennsylvania, Respondent. (Six Cases.)

Commonwealth Court of Pennsylvania.

Decided Feb. 1, 1995.

Before COLINS, President Judge, and McGINLEY, SMITH, PELLEGRINI, FRIEDMAN, KELLEY and NEWMAN, JJ.

OPINION

COLINS, President Judge.

Erieview Cartage, Inc. (Erieview) petitions for review of an order of the Board of Finance and Revenue (Board) sustaining the Department of Revenue's (Revenue) assessment of corporate net income[1] (CNI) and corporate franchise[2] taxes for the years 1983 through 1985. We affirm.

The facts of the case are stipulated, and the Court adopts them. Erieview is a Delaware corporation with headquarters in Ohio. During the tax years in question, Erieview engaged in interstate motor transportation of property with Interstate Commerce Commission authorization as a contract carrier with irregular routes. Erieview has no certificate of public convenience from the Pennsylvania Public Utility Commission to engage in intrastate

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[1]Sections 401-412 of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. §§ 7401-7412.

[2]Sections 601-606 of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. §§ 7601-7606.

transportation, and it has no certificate of authority from the Pennsylvania Department of State.

Erieview transports property through Pennsylvania (pass-through miles), delivers property to Pennsylvania destinations from outside the state, and picks up property in Pennsylvania for delivery out of state. In each of the tax years in question, Erieview logged approximately 2 million highway miles in Pennsylvania, constituting approximately 15 to 18 percent of its total transportation miles for each year. Erieview owns no property in Pennsylvania and has no Pennsylvania business establishment or employees. All of Erieview's transportation business is conducted using equipment leased from independent owner-operators. The leases give Erieview exclusive possession, control, and use of the equipment and complete responsibility.

In the tax years 1983 through 1985, Erieview, as a motor carrier for hire, filed and paid Pennsylvania gross receipts tax[3] based on interstate miles travelled in Pennsylvania. The gross receipts tax is an excise tax paid for the use of Commonwealth highways. 72 P.S. § 2184. Erieview did not file Pennsylvania tax returns. Based on the foregoing information, Revenue's Bureau of Examination requested that Erieview file corporate net income tax and foreign corporation franchise tax reports. Erieview paid settlement amounts due, and in administrative reviews Erieview argued that it was not subject to the taxes. On appeal, the Board denied relief.

Erieview now requests that this Court find the assessment of the CNI and franchise taxes unconstitutional and inconsistent with Pennsylvania law. Erieview alleges that the imposition of the taxes

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[3]Sections 1-9 of the Act of June 22, 1931, P.L. 694, *as amended*, 72 P.S. §§ 2183-2191.

violates the Due Process Clause of the Fourteenth Amendment[4] and creates an impermissible burden on interstate commerce[5].

The Pennsylvania Taxes

The CNI tax applies to Erieview as a corporation doing business in the Commonwealth, carrying on activities in the Commonwealth, and having capital employed or used in the Commonwealth. 72 P.S. § 7401(1)(i)-(iii). Because Erieview is a trucking company whose entire business is not transacted within the Commonwealth, the tax assessment is based on the amount of Erieview's total net business income apportionable to revenue miles within the Commonwealth. 72 P.S. § 7401(3)2(b)(1). The franchise tax similarly applies to Erieview as a foreign entity doing business, carrying on activities, and having capital employed or used in the Commonwealth; and the assessment is apportioned using revenue miles within the Commonwealth. 72 P.S. §§ 7601, 7602(b).

State Taxation of Interstate Commerce

Having addressed numerous cases involving due process and Commerce Clause challenges to state taxation of foreign corporations, the U.S. Supreme Court has provided the framework for our analysis. We begin by applying the tests for each of the constitutional requirements to determine whether the Commonwealth has the authority to tax Erieview at all. *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 112 S.Ct. 2251, 119 L.Ed.2d 533 (1992). If we determine that the state does have the authority to tax, we then apply the unitary business principle to determine "the reach of the State's legitimate power to tax." *Id.* at ____, 112 S.Ct. at 2258.

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[4]U.S. Const. amend. XIV.

[5]U.S. Const. art. I, § 8, cl. 3.

The Due Process Clause requires a minimum connection between the interstate activities and the taxing state and that the income attributed to the state be rationally related to the intrastate value of the corporate business. *Quill Corporation v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992); *Mobil Oil Corporation v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 100 S.Ct. 1223, 63 L.Ed.2d 510 (1980). As noted in *Quill*, the minimum connection or nexus necessary for due process is based in the principles of fair play and substantial justice the court has developed in the area of judicial jurisdiction.[6] Using that standard, a state can constitutionally tax a corporation's activities when the corporation has fair warning that the activity might subject it to the state's jurisdiction. *Quill*, 504 U.S. at ___, 112 S.Ct. at 1911.

"[I]n the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax." *Allied-Signal*, 504 U.S. at ___, 112 S.Ct. at 2258. In the instant case, Erieview has purposefully directed its activities at the Pennsylvania economic market, and the Pennsylvania taxes are rationally related to value Erieview receives from being able to carry on its activities in the Commonwealth. Erieview engages in the business activity of interstate transportation of property, and 15 to 20 percent of that activity (as measured in revenue miles) takes place within the Commonwealth. "[T]he requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State." *Quill*, 504 U.S. at ___, 112 S.Ct. at 1911.

Commerce Clause restrictions on state taxation are currently embodied in the four-part test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). A

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[6] *See International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.95 (1945) (traditional notions of fair play and substantial justice); *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977); *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (purposeful availment of the benefits of an economic market even when the corporation has no physical presence in the state).

tax will be sustained against a Commerce Clause challenge so long as the tax meets all four requirements: The "tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Id.* at 279, 97 S.Ct. at 1079.

The challenged Pennsylvania taxes meet the substantial nexus requirement. In this case, the taxed activity is transportation of property, and that activity has a substantial nexus with the Commonwealth. The nexus in this case is the same as that found in *C.I. Whitten Transfer Company v. Department of Revenue*, 34 Pa.Commonwealth Ct. 37, 382 A.2d 1251 (1978), wherein we sustained a Commerce Clause challenge to the application of the CNI and franchise taxes to a foreign corporation engaged in interstate freight transportation. In that case, we referred to the fact that the corporation had a certificate of authority to do business in Pennsylvania in our discussion of the activity's substantial nexus with the Commonwealth, but by no means is such authorization essential to, or determinative of, the required nexus. The presence or absence of the certificate has no bearing on the volume of a corporation's business activities within the Commonwealth and its ability to take advantage of the Commonwealth's economy and services. In fact, the Commonwealth's proportionate share of Erieview's total revenue miles is greater than its share in *C.I. Whitten*, and C.I. Whitten had a certificate of authorization. *Id.* at 43-44, 382 A.2d at 1253-54.

The second and third parts of the *Complete Auto Transit* test address the potential problem of multiple taxation. The Pennsylvania CNI and franchise taxes are fairly apportioned and do not discriminate against interstate commerce. The taxes are assessed against both domestic and foreign corporations, and the use of an apportionment formula ensures that the Commonwealth takes no more than its fair share based on a comparison of total revenue miles and revenue miles within the Commonwealth. We came to the identical conclusions in *C.I. Whitten Transfer*: "The apportionment fraction used in computing Whitten's taxes assures that Whitten's interstate activities bear no more than '"a fair share of the cost of the

local government whose protection it enjoys."'" *Id.* at 46, 382 A.2d at 1255 (quoting *Central Greyhound Lines, Inc. of New York v. Mealey*, 334 U.S. 653, 663, 68 S.Ct. 1260, 1266, 92 L.Ed. 1633 (1948) (quoting *Freeman v. Hewit*, 329 U.S. 249, 253, 67 S.Ct. 274, 277, 91 L.Ed. 265 (1946)).

That Erieview might be subject to double taxation does not necessarily mean that Pennsylvania's taxation places an undue burden on interstate commerce. The apportionment formula ensures that the Commonwealth taxes no more of the activity than is attributable to activities carried on within its borders. Assuming that each state applies its taxes only to those business activities having the required nexus, multiple taxation should be avoided.[7] In *Mobil Oil Corporation*, the U.S. Supreme Court rejected the corporation's argument that Vermont could not tax a portion of its dividend income because New York, its domicile, could tax all of its dividend income. Erieview cannot likewise avoid Pennsylvania taxes by raising the possibility of multiple taxation in the event that its domicile also taxes amounts apportionable to Pennsylvania.

The Pennsylvania taxes are fairly related to services provided by the Commonwealth. Erieview benefits directly and indirectly from the Commonwealth's protection, opportunities, and services. Notably, Erieview avails itself of access to the Commonwealth's economic market and enjoys the benefits and protections of its courts, laws, and law enforcement. Erieview uses the

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[7] Although there is no clear holding on the issue, prominent commentators have suggested that income derived from interstate activities may be taxed in full by the domiciliary state and on an apportioned basis by nondomiciliary states in which the activities are conducted without offending the commerce clause.

David F. Shores, *State Taxation of Interstate Commerce: Quill, Allied Signal and a Proposal*, 72 Neb.L.Rev. 682, 717 n. 150 (1993).

Commonwealth's roadways and bridges and shares in the benefits of its roadway maintenance and safety services.

Having determined that Pennsylvania may constitutionally tax Erieview as a foreign corporation doing business and employing capital in the Commonwealth, we now turn to the unitary business principle to ascertain the scope of that power to tax.[8]

> [T]he unitary business rule is a recognition of two imperatives: the States' wide authority to devise formulae for an accurate assessment of a corporation's intrastate value or income; and the necessary limit on the States' authority to tax value or income which cannot in fairness be attributed to the taxpayer's activities within the State.

Allied-Signal, 504 U.S. at ___, 112 S.Ct. at 2259. The unitary business principle permits a state to tax its proportionate share of the value of the unitary multistate business operation. The same principles that permit a state to tax a foreign corporation's in-state capital stock by reference to its unitary business also allow proportional valuation of a unitary business in enterprises of other sorts. *Id.* at ___- ___, 112 S.Ct. at 2258-59. The principle has long applied to franchise and income taxes as well as to property taxes. *Id.; see, e.g., Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165 (1920) (income tax).

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[8]The unitary business principle is invoked most often in cases where the taxing state attempts to reach income obtained from sources unrelated to the unitary business activity; for example, dividend income, which arises from investment activity, would not be apportionable if the dividend payor's activities are unrelated to the corporation's activities in the taxing state. *See, e.g., Mobil Oil Corporation* (dividend income apportionable as unitary business income); *ASARCO Incorporated v. Idaho State Tax Commission*, 458 U.S. 307, 102 .S.Ct. 3103, 73 L.Ed.2d 787 (1982) and *F.W. Woolworth Co. v. Taxation & Revenue Department*, 458 U.S. 354, 102 S.Ct. 3128, 73 L.Ed.2d. 819 (1982) (dividend income not apportionable because not part of unitary business income).

Accordingly, Erieview is subject to the Commonwealth's CNI and franchise taxes, which have been constitutionally applied in accordance with the requirements of Due Process and Commerce Clauses.

ORDER

AND NOW, this 1st day of February, 1995, judgment in the above-captioned matter is entered in favor of the Commonwealth in the amount of $79,769:

	Franchise Tax	Corporate Net Income Tax
1983	$3,977	$20,252
1984	7,320	20,450
1985	7,320	20,450

Judgment becomes final unless exceptions are filed within thirty (30) days of the entry of this order pursuant to Pa.R.A.P. 1571(i).

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

Nos. 437, 438, 439, 440, 441, 442 F.R. 1992
(Consolidated)

ERIEVIEW CARTAGE, INC.,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF REVENUE,
Respondent.

On Appeal from the Orders of the
Board of Finance and Revenue
at Docket Nos. 92-8559 through 92-8564

STIPULATION OF FACTS

Counsel for Petitioner

LAWRENCE A. SALIBRA, II
Erieview Cartage, Inc.
6060 Parkland Blvd.
Mayfield Heights, OH 44124
(216) 423-6918

FREDERIC M. WILF
Saul, Ewing, Remick & Saul
1055 Westlakes Drive, Suite 150
Berwyn, Pennsylvania 19312
(610) 251-5082

Counsel for Respondent

KEVIN A. MOURY
Deputy Attorney General
Commonwealth of Pennsylvania
Tax Litigation Unit
Strawberry Square, 15th Floor
Walnut and Third Street
Harrisburg, Pennsylvania 17120
(717) 783-1460

STIPULATION OF FACTS

AND NOW, this 25th day of April, 1996, pursuant to Rule 1571(f) of the Pennsylvania Rules of Appellate Procedure, it is hereby stipulated and agreed by and between Kevin A. Moury, Deputy Attorney General, counsel for the Commonwealth of Pennsylvania Department of Revenue (hereinafter "Department of Revenue") and Lawrence A. Salibra, II, and Frederic M. Wilf, counsel for Petitioner, Erieview Cartage, Inc. (hereinafter "Erieview"), that the following facts may be accepted as true for the purposes of trial of this matter, that all exhibits referred to herein and attached hereto are incorporated into this stipulation and made a part hereof, and that where such exhibits are not the original documents referred to, they are true and correct copies thereof.

1. Erieview is a Delaware Corporation organized and existing under the laws of that state. Erieview maintains its headquarters in Warren, Ohio. Erieview is a subsidiary of Alcan Aluminum Corporation, an Ohio corporation which throughout all relevant times hereto conducted business in Pennsylvania and was subject to Pennsylvania Corporate Net Income and Franchise Tax.

2. During the tax years 1986 through 1988 (the "tax period"), Erieview provided interstate motor transportation of property as an Interstate Commerce Commission (ICC) commonly controlled contract carrier and a common carrier with irregular route authority. Copies of Erieview's ICC rights during the period are attached hereto, made a part hereof and marked as Exhibit A. During the tax period, Erieview was not authorized by the Pennsylvania Public Utility Commission to engage in intrastate transportation within Pennsylvania.

3. During the tax period, Erieview's operations consisted of the transportation of property:

a. Through Pennsylvania, from points of origin outside of Pennsylvania to points of destination outside of Pennsylvania; and

b. Out of Pennsylvania, from points of origin within Pennsylvania (pick-up) to points of destination outside of Pennsylvania (delivery); and

c. Into Pennsylvania, from points of origin outside of Pennsylvania (pick-up) to points of destination within Pennsylvania (delivery).

4. During the tax period, Erieview served dozens of customers with locations in Pennsylvania, most of whom were business not related in any manner to Erieview. By example, four of these customers were:

a. Alcan Aluminum Corporation, Erieview's parent corporation, located in Williamsburg, Pennsylvania;

b. Lockhart Iron and Steel, located in McKee's Rock, Pennsylvania;

c. Pre-Finished Metals, located in Morrisville, Pennsylvania;

d. J.T. Ryerson, located in Philadelphia, Pennsylvania.

5. Erieview's mileage in Pennsylvania highways totalled 1,861,211 miles in 1986, 1,766,995 miles in 1987, and 1,536,002 miles on Pennsylvania's highways in 1988. During the tax period, Pennsylvania mileage represented 17.6% total Erieview mileage in

1986, 15.4% in 1987, and 12.9% in 1988. Tabulated, the numbers appear as follows:

Year	Pennsylvania Mileage	Total Mileage	Percentage
1986	1,861,211	10,587,260	17.6%
1987	1,766,995	11,443,839	15.4%
1988	1,536,002	11,906,952	12.9%

6. During the tax period, Erieview operated both within Pennsylvania and without Pennsylvania solely with drivers and equipment leased from independent contractors. A typical lease agreement is attached hereto, made a part hereof and marked as Exhibit B.

7. None of the motor vehicles used in interstate commerce were owned by Erieview. All of the independent contractors had the right to contract with other entities, even those in competition with Erieview, because there were no restrictions on such lessors in any agreements, written or oral, with Erieview. During the tax period, for all other States in which Erieview operated, it operated in the same manner as it operated within Pennsylvania. Thus, Erieview operated in all other such States solely with personnel and equipment leased from independent contractors.

8. During the tax period, Erieview did not engage in intrastate transportation within Pennsylvania, i.e., the transportation of property from a point within Pennsylvania (pick-up) to a point of destination also within Pennsylvania (delivery).

9. During the tax period, Erieview maintained no office or other place of business within Pennsylvania.

10. During the tax period, Erieview employed approximately 20 employees including officers. None of the employees were actually engaged in operating equipment used in interstate motor transportation of property, either within or without Pennsylvania. During the tax period, none of Erieview's employees worked within Pennsylvania.

11. Throughout the tax period, Erieview did not own any motor vehicles that were used to transport property under Erieview's ICC authority.

12. During the tax period, Erieview filed Pennsylvania Gross Receipts Tax Reports (Operators of Motor Vehicles for Hire) and Motor Carrier Road Tax Reports (as the carrier of record). Erieview paid road taxes to Pennsylvania in the amount of $15,980

for the tax year 1986, $17,214 for tax year 1987, and $15,161 for tax year 1988. Copies of the Gross Receipts Tax Reports are attached hereto, made a part hereof and marked as Exhibit C.

13. In response to Erieview's filing of Gross Receipts Tax Reports, the Department of Revenue required Erieview to file Pennsylvania Corporate Tax Reports for corporate net income and franchise taxes for the tax years 1986, 1987 and 1988. Settlements of such reports were mailed to Erieview. A copy of these tax reports and settlements are attached hereto, made a part hereof and marked as Exhibit D (1986 tax year), Exhibit E (1987 tax year), Exhibit F (1988 tax year), and Exhibit G (settlements).

14. The settlements described in paragraph 13 above were the subject of administrative reviews, in which Erieview argued that it was not subject to the Corporate Net Income tax or the Franchise Tax on the grounds that the application of such taxes to Erieview violate Pennsylvania law and the U.S. Constitution. These administrative appeals were denied, and Erieview has exhausted all of its administrative appeals. Erieview timely filed its petitions for review for this appeal to the Commonwealth Court.

15. The sole issue for determination in these cases is whether Erieview is subject to the Pennsylvania Corporate Net Income Tax and the Franchise Tax based on Pennsylvania law and whether such tax is permitted or prohibited by the United States Constitution.

16. If this Court finds in favor of Erieview, it should enter an order that Erieview is not subject to the Corporate Net Income Tax and the Franchise Tax, and direct that Erieview's 1986 through 1988 corporate net income tax or franchise tax should be reduced to zero.

17. If this Court finds in favor of the Department of Revenue, it should enter an Order affirming the decision of the Board of Finance and Revenue in each of these cases, and order that Erieview's 1986 through 1988 corporate net income and franchise taxes be sustained, with interest as provided by law.

18. The parties reserve the right to object to any fact contained in this Stipulation on the grounds of relevancy or materiality.

Respectfully submitted,

Counsel for Petitioner,
Erieview Cartage, Inc.:

/s/

Lawrence A. Salibra, II
Erieview Cartage, Inc.
6060 Parkland Blvd.
Mayfield Heights, Ohio 44124
(216) 423-6918

/s/

Frederic M. Wilf
Saul, Ewing, Remick & Saul
1055 Westlakes Drive, Suite 150
Berwyn, Pennsylvania 19312
(610) 251-5082

Counsel for the Respondent
Commonwealth of Pennsylvania:

/s/

Kevin A. Moury
Deputy Attorney General
Commonwealth of Pennsylvania
Tax Litigation Unit
Strawberry Square, 15th Floor
Walnut and Third Street
Harrisburg, Pennsylvania 17120
(717) 783-1460